

**DIRECT TESTIMONY  
OF  
DR. ROBERT C. LEACHMAN and MR. EVAN T. DAVIDSON  
Before the Board of Pilot Commissioners  
San Francisco, California**

**1. Dr. Leachman, please give a summary of your professional background and employment.**

I received the AB degree in Mathematics and Physics in 1973, the MS degree in Operations Research in 1975, and the PhD degree in Industrial Engineering and Operations Research, all from the University of California at Berkeley. During semester breaks and summers in 1970, 1971, 1972 and 1975, I worked various positions in the Operating Department of the Oregon Division of the Union Pacific Railroad. During the years 1973 and 1974 I worked as a Service Planning Analyst in the Marketing Department of Union Pacific Railroad. During the period 1977 – 1982 I worked as a Planning Engineer, Senior Engineer and an Associate Engineer for Alan M. Voorhees & Associates, later PRC Planning & Economics, a nationally-recognized transportation planning firm. Beginning in 1979 I joined the faculty of the Dept. of Industrial Engineering and Operations Research at the University of California at Berkeley, rising to the rank of Full Professor in 1992, a position I now hold. In 1983 I founded Leachman & Associates, and I continue to serve as Principal for this limited liability company (LLC). Leachman & Associates provides consulting and software for the management and design of supply chains and for economic and capacity analysis of freight transportation.

**2. Mr. Davidson, please give a summary of your professional background and employment.**

I received dual BS degrees in Mathematics and Management with a focus in Operations Research from Massachusetts Institute of Technology in 2003 and a MS degree in Industrial Engineering and Operations Research from the University of California at Berkeley in May, 2010. I am currently a PhD student in Industrial Engineering and Operations Research at U C Berkeley with expected graduation in May, 2012. From July, 2003 through August, 2005 I worked for ProfitLogic, a software development firm for merchandise and supply chain management for large retailers in the USA and Canada. I developed software and analysis for pricing, inventory, and merchandising management for large retailers of consumer goods. In August, 2005 ProfitLogic was acquired by Oracle and became the Oracle Retail division of Oracle. I continued to work at Oracle Retail as an analyst and scientist until October, 2009. I currently work under Professor Leachman as a graduate research assistant at U C Berkeley. I also work part-time as a staff engineer for Leachman & Associates LLC.

**3. Dr. Leachman, prior to being asked by the San Francisco Bar Pilots to participate in this rate case, have you had occasion to address yourself professionally to any maritime related issues in the San Francisco Bay area?**

Yes. Since 2003 I have directed the development and application in policy analysis of a large-scale economic model embracing all waterborne containerized imports from Asia to the

Continental United States. The model computes optimal supply chain strategies for each of the 83 largest importers of Asian goods to the USA, plus optimal supply chain strategies for each of 19 generic importers serving as proxies for small and regional importers. The supply chains are optimized in the sense of providing the lowest total logistics costs including all costs for transportation and handling plus holding costs for pipeline inventories and destination safety-stock inventories of the imported goods.<sup>1</sup> The model is calibrated with U S Customs data concerning total TEU (twenty-foot equivalent unit) volumes and declared values for Asian imports stratified into 99 commodity types and the 102 importers; rate quotations from steamship lines, intermodal marketing companies, and third party logistics providers; and statistics concerning container flow times by port and landside transportation channels. Supply-chain volumes from all importers calculated by the model are aggregated to predict volumes by port and landside transportation channel for each of 11 potential North American ports of entry, including the Port of Oakland, and 21 destination regions (e.g., the region local to Oakland includes Northern California, Northern Nevada, Northern Utah, Wyoming and Northern Colorado). This model is known as the Elasticity Model because by performing repeated calculations the model may be used to assess the impact of potential container fees or changes in transportation rates in terms of shifts in import volumes by port or channel. The Elasticity Model has been applied in policy analysis for the San Pedro Bay ports and the Puget Sound ports to assess the impact of potential container fees and potential infrastructure improvements at those ports and in landside transportation channels serving those ports. It also has been applied to assess and re-engineer the supply chains of some of the largest American importers of Asian goods. The Southern California Association of Governments has made publicly available the consulting reports describing the Elasticity Model and results of its application in policy analysis for the San Pedro Bay ports.<sup>2</sup> The methodology underlying the Model also has been published in the academic journal *Transportation Research*.<sup>3</sup>

**4. Mr. Davidson, prior to being asked by the San Francisco Bar Pilots to participate in this rate case, have you had occasion to address yourself professionally to any maritime related issues in the San Francisco Bay area?**

Yes. Since 2009 I have been working with Dr. Leachman to expand the analytical capabilities of the Elasticity Model he described and to apply the Model to optimize import supply chains for a large American retailer as well as to apply it in governmental policy analysis of hypothetical container fees applied at West Coast ports. I have developed refinements of the optimization logic, and I have enhanced the Model to consider different supply chain strategies applied to different portions of the import product portfolio of very large retailers. My research will be

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<sup>1</sup> Safety stock inventories are maintained by retailers as a hedge against uncertainties in demand (e.g., sales between replenishment shipments of imports from Asia higher than forecasted) and uncertainties in supply (e.g., not all the containers of imports arriving when expected).

<sup>2</sup> See Leachman, Robert C. *Final Report, Port and Modal Elasticity Study*, prepared for the Southern California Association of Governments, Sept. 2005. Report may be downloaded from the SCAG web site, <http://www.scag.ca.gov/goodsmove/pdf/FinalElasticityReport0905rev1105.pdf>, and Leachman, Robert C., *Final Report, Port and Modal Elasticity Study – Phase II*, prepared for the Southern California Association of Governments, Sept. 2010. Report may be downloaded from the SCAG web site, <http://www.scag.ca.gov/goodsmove/elasticitystudyphase2.htm>

<sup>3</sup> See Leachman, Robert C., 2008. "Port and Modal Allocation of Waterborne Containerized Imports from Asia to the United States," *Transportation Research Part E*, 44 (2), p. 313 – 331 (March, 2008).

presented at the 2011 Global Supply Chain Management Conference in New York in May, 2011, and a scholarly paper has been submitted for publication in the academic journal *Transportation Research*. This research forms the basis for my PhD dissertation at U C Berkeley.

**5. Dr. Leachman and Mr. Davidson, have you applied the Elasticity Model to assess the impact of a potential increase in the fees charged by the San Francisco Bar Pilots?**

Yes, we have done so during January and February, 2011.

**6. Would you please explain your analysis and conclusions from your study.**

The input data for the Elasticity Model reflects 2007 overall Asia – Continental USA import volume, 2006 import mix by commodity, declared value and importer, 2007 transportation and handling rate quotations, and 2006 container flow-time statistics. 2006 represents the peak year for volume of imports from Asia.

We computed import flows using the Model once with the base-case data and then a second time assuming a \$1.22 per FEU (forty-foot equivalent unit) surcharge on rates paid by beneficial cargo owners (BCOs) if their imports are routed through the Port of Oakland.

Before addressing the specifics of the Oakland situation, it is helpful to understand the general supply-chain strategies for Asia – USA imports. Importers may be classified into four broad groups: (1) small and regional importers, i.e., importers bringing in goods consumed solely within one region of the Continental USA, and/or small-scale importers, bringing in less than 200 TEUs per week; (2) large nation-wide importers of inexpensive goods, bringing in more than 200 TEUs per week of goods with average declared value less than \$13 per cubic foot that are distributed across the Continental USA; (3) large nation-wide importers of moderate-value goods, bringing in more than 200 TEUs per week of goods with average declared value between \$13 and \$24 per cubic foot that are distributed across the Continental USA; and (4) large nation-wide importers of expensive goods, bringing in more than 200 TEUs per week of goods with average declared value higher than \$24 per cubic foot.

Category (4) importers develop supply chains to manage inventories as tightly as possible. This category includes original equipment manufacturers (OEMs) who bring Asian-manufactured goods to the USA and then re-sell them to USA retailers, re-shipping the goods to regional distribution centers or retail outlets operated by the retail customers. Onward landside shipment from a cross-dock or import warehouse in the vicinity of the port of entry is made in domestic trailers or containers. The vast majority of imports from Asia in this category enter the USA through the San Pedro Bay ports; the amount coming through Oakland in this category is negligible. Category (3) importers develop supply chains involving 2-5 ports of entry for the Continental USA, whereby marine containers are routed to cross-docks in the vicinity of the port of entry, the imported goods are sorted and re-stuffed into domestic containers and trailers that are dispatched to regional distribution centers or to an import warehouse (for goods not yet in demand). A relatively small amount of import volume at the Port of Oakland is accounted for by Category (3) importers. Category (2) importers develop supply chains to manage transportation

costs as tightly as possible. In these supply chains, marine boxes are routed directly from the source factories in Asia to regional distribution centers across the Continental USA. Category (1) importers are too small in scope or scale to achieve any economies from the inventory management practices of the Category (3) and (4) importers, and so they develop supply chains similar to those of Category (2) importers. The vast majority of imports at the Port of Oakland are accounted for by Category (1) and Category (2) importers.

Table 1 shows the tonnage-based mill rate bar-crossing fees for container vessels as charged by the San Francisco Bar Pilots, and the total container TEUs loaded or discharged at the Port of Oakland for the years 2009 and 2010. The last column of the table shows the ratios of the two figures in each year, i.e., the effective average charge per TEU loaded or discharged at the Port of Oakland. The container vessels calling at the Port of Oakland carry many more containers than the quantities shown, because the vessels call at other West Coast ports before returning to Asia. Thus the vessels are much larger than would be required to handle only the volume to and from the Port of Oakland. The figures in the last column show the effective costs assuming 100% of the San Francisco Bar Pilots' container vessel tonnage-based mill rate bar-crossing fees are allocated to solely containers loaded or discharged at the Port of Oakland. As may be seen, the effective cost per TEU handled at Oakland was \$9.35 in 2009, then falling to \$8.85 in 2010.

In 2010, total tonnage-based mill rate bar-crossing fees charged by the S. F. Bar Pilots (SFPB) amounted to \$30,507,999. Comparing to the 2010 entry for container vessel tonnage fees appearing in Table 1, it may be seen that tonnage-based bar-crossing charges to container vessels accounted for about 67.6% of total SFBP tonnage-based mill rate bar-crossing fees. During 2010, the SFBP collected \$3,042,691 in surcharges placed on bar fees for new pilot boats. Assuming uniform application of these surcharges to container-vessel and non-container-vessel accounts, it is estimated that  $\$20,616,109 - (0.676)(\$3,942,691) = \$17,950,850$  is the 2010 amount of SFPB tonnage-based fees charged to container vessels exclusive of surcharges. We have been advised that the total SFBP pilot boat surcharges will diminish to an estimated \$1,104,118 in 2012. Again applying the 67.6% share, the 2012 surcharges for new pilot boats applied to container vessels, assuming 2010 container vessel tonnage, would be \$746,384.

The SFBP are proposing to institute in 2012 a rent surcharge estimated to raise \$1,237,644 and a fuel surcharge estimated to raise \$1,009,134, for a total of \$2,246,778. Again applying the 67.6% share factor, the total rent and fuel surcharges on container vessels would be \$1,518,822. The SFBP also are proposing to institute a transportation surcharge per bar crossing rising to \$91.30 by 2015. If applied to the 3,781 bar crossings in 2010 by container vessels, the transportation surcharge would have raised a total of \$345,205. Total surcharges for container vessels in 2010 would have been \$1,864,027.

The SFBP also is proposing a 6% rate increase in its vessel tonnage rate in 2014 and another 6% increase in 2015, for a compound increase of 12.36%. Applying this increase to the \$17,950,850 in 2010 tonnage fees on container vessels before surcharges, the 2010 SFBP tonnage-based mill rate bar-crossing fees on container vessels before surcharges would have been \$20,169,575.

Combining total rent, fuel and transportation surcharges with the increased tonnage fees as immediately above, the total annual tonnage-based bar crossing charges on container vessels

assuming 2010 tonnage amounts to \$22,033,602. Compared against the \$20,616,109 actually charged in 2010, we can conclude that the proposed changes in surcharges plus the proposed rate increases in aggregate amount to a 6.876% increase in tonnage-based bar crossing fees charged to container vessels. Considering the \$8.85 allocated cost per TEU, the proposed changes are equivalent to raising the allocated cost per TEU to \$9.46, i.e., an increase of \$0.61 per TEU.

A calculation of the Elasticity Model with a \$1.22 per forty-foot equivalent unit (FEU) added at the Port of Oakland was made to assess the impact of the proposed 6.876% increase in S. F. Bar Pilots' tonnage fees for container vessels, were that increase fully passed through to importers.

The base-case calculation of the Elasticity Model predicts a 2007 Asian import volume at the Port of Oakland of 640,644 TEUs. Table 2 shows the 2009 import volume shares at the Port of Oakland by Asian countries, as reported on the Port web site. As may be seen, Asian countries account for about 80% of all containerized imports at the Port of Oakland on a TEU basis. The actual 2007 import volume at the Port of Oakland was 870,284 TEUs.<sup>4</sup> Applying the 80% factor, we estimate that the actual 2007 import TEU volume from Asia at the Port of Oakland was about 696,659 TEUs, i.e., 8.7% more than predicted by the Elasticity Model.

A re-run of the calculation of the Elasticity Model with the added \$1.22-per-FEU fee at Oakland resulted in the same annual import volume, i.e., 640,644 TEUs. That is, the fee value is not large enough to induce importers whose least costly supply chain utilized the Port of Oakland to modify their supply chains so as to reduce their import volumes routed via Oakland.

Reviewing the Model calculations in more detail, in both the Base-Case and the \$1.22-per-FEU-Fee scenarios, all of the import volume at the Port of Oakland consists of goods imported by Category (1) and Category (2) importers to be consumed in the region local to Oakland. As discussed above, this region includes all of Northern California, Northern Nevada, Northern Utah, all of Wyoming, and northern Colorado.

In reality, there is a relatively small portion of the total import volume at the Port of Oakland that consists of marine boxes of goods consumed in other regions, predominantly regions lying east of the Rockies. Containers handling this import volume predominantly leave Oakland in double-stack container trains moving under Inland Point Intermodal (IPI) service sold to the beneficial cargo owners (BCOs) by the steamship lines. This service is predominantly used by Category (1) and Category (2) importers. Under IPI service, there is one bill of lading covering the entire move from a factory in Asia to a USA distribution center destination for the marine box. The port of entry to the United States is at the discretion of the steamship line, which has secured contracts with the railroads to handle the marine containers in double-stack trains. An important feature of the contract between steamship line and railroad specifies imbalance payments the line must make to the railroad if eastbound and westbound volumes of rail-borne containers at Oakland are out of balance.

Table 3 provides statistics on the distribution of vessel strings serving both Asian ports and the Port of Oakland for the Summer, 2006 season. The average TEU capacities of vessels fulfilling each string were used to determine the TEU-weighted capacity share in each string. As may be

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<sup>4</sup> Source: Port of Oakland web site, [http://www.portofoakland.com/maritime/facts\\_cargo.asp](http://www.portofoakland.com/maritime/facts_cargo.asp).

seen, in 2006 only 6.53% of the aggregate Asia – West Coast vessel capacity made its first West Coast port of call at Oakland. From the BCO's perspective, and hence the Elasticity Model's perspective, there is no advantage to route imports destined to, say, Chicago via San Francisco Bay instead of via Puget Sound or San Pedro Bay. In fact, there is a disadvantage. Container flow times for IPI service are generally longer via Oakland, because more than 93% of the TEU capacity calls at other West Coast ports first. However, if a steamship line has significant export rail volume routed via Oakland, it is in the line's interest to route sufficient IPI imports via Oakland to balance Oakland eastbound IPI (import) flows with the westbound IPI (export) flows and thereby avoid imbalance payments to the railroads. This is the primary reason the actual import volume is 8.7% higher than the model's predicted import volume at Oakland, i.e., it is the primary reason that about 8% of total Asian imports at Oakland are not local-region volume.

The payments to the railroads by steamship lines for imbalances in their railroad volumes are much greater than several dollars per forty-foot container (FEU), on the order of hundreds of dollars per FEU. As long as export volumes come to Oakland via rail-borne marine boxes, the lines will have the economic incentive to balance these flows to some extent with IPI imports. Let us assume for the moment that exports are not affected by an increase in a SFBP fee increase of a \$1.22 per FEU. (We will address the impact of a fee increase on exports below.) Then the proposed increase in SFBP fees will not diminish IPI imports routed via Oakland.

In 2010, the long-distance trucking rates paid by several large American importers of Asian goods averaged \$2.19 per mile, including fuel recovery surcharges.<sup>5</sup> Thus a 6.876% rise in the tonnage fee charged by the SFBP to container vessels passed on to the BCOs is roughly equivalent to the cost of trucking a forty-foot container an additional 0.56 miles.

The vast majority of imports from Asia to the Continental USA are retail goods, or goods that will become retail goods after minor value-added operations and/or re-sale.<sup>6</sup> Marine containers containing such imports destined to the region local to Oakland are by and large not routed to factories nor are they routed to retail outlets. Instead, they are routed to regional distribution centers of large retailers. In 2003, large nation-wide retailers accounted for about 30% of total Asia – Continental USA waterborne containerized imports; in 2007, they accounted for 40%; and we estimate that in 2010 they accounted for 50%.<sup>6</sup> The Northern California regional distribution centers for most large American retailers are located in the Woodland – Stockton stretch of the I-5 Corridor. Thus the destinations for import marine containers imported through Oakland containing goods to be consumed in the region local to Oakland are fairly concentrated. Trucking a forty-foot marine container up from the Port of Los Angeles to a warehouse located in the Stockton – Woodland stretch of the I-5 Corridor costs on the order of \$750-\$900, compared to \$300-\$400 for a dray from Oakland. Trucking a container from the Port of Portland or the Puget Sound ports to these distribution centers would cost even more. The cost penalty for serving distribution centers in Reno, Salt Lake City or Denver from the Pacific Northwest ports or from Los Angeles in lieu of Oakland is not as extreme as the forgoing, but still much more than \$1.22 per forty-foot box. Thus an increase of \$1.22 per forty-foot container routed via the

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<sup>5</sup> Private communication from these importers.

<sup>6</sup> Based on review of US Customs data. See Leachman, Robert C., *Final Report, Port and Modal Elasticity Study – Phase II*, prepared for the Southern California Association of Governments, Sept. 2010. Report may be downloaded from the SCAG web site, <http://www.scag.ca.gov/goodsmove/elasticitystudyphase2.htm>.

Port of Oakland resulting from a 6.876% increase in SFBP fees would not have a significant impact on imports destined within the region local to Oakland.

We now would like to turn to the impact of a proposed fee increase on exports routed via the Port of Oakland. The Port of Oakland is distinctive among U.S. West Coast ports in that export volumes surpass import volumes. In 2010, Oakland exported 954,814 loaded TEUs while it imported 802,913 loaded TEUs, i.e., exports in 2010 were about 18.9% higher than imports.<sup>7</sup> Table 4 displays 2009 export volumes (in dollars) at Oakland for the top 15 commodities. The top export commodity is edible fruits and nuts; this is almost entirely California-produced. Fourth on the list is beverages, which is dominated by California-produced wine and fruit juices. Other agricultural exports include meat (second), hides and skins (fourteenth) and cereals (seventh). These include some California production but also include considerable exports originating in the Intermountain region or regions east of the Rockies. Commodities such as machinery, vehicles (includes motorcycles)<sup>8</sup>, and iron and steel products are largely not California-produced. It is clear that the Port of Oakland attracts exports from inland regions, and this in turn drives some IPI import volume to Oakland (in order to balance rail flows). The exports from the Port of Oakland are a mix of containers loaded in the local region and containers loaded in distant regions. We will discuss each in turn.

In contrast to destinations for imports, origins for containerized exports from California are much more spread out, reflecting the locations of agricultural production or manufacture. For exports originating in California, as was noted above, a \$1.22 per FEU increase in costs to an exporter is equivalent to requiring that exporter to truck his goods about 0.56 miles further. In comparing the relative trucking costs of routing exports via the San Pedro Bay ports vs. routing exports via Oakland, if transportation costs were the only concern, we could expect exporters in a band about 0.56 miles wide stretching across the state from east to west to shift preferences in ports. Assuming exporters are uniformly distributed south-to-north across the 440-mile north-south extent of the Central Valley, this is a very small impact, about 0.13% of total California exports.

But transportation cost is not the only consideration. As noted in Table 3, while the vessel rotations work against Oakland for imports (because transit times from Asia to the Port of Oakland are longer), they work in Oakland's favor for exports. Exports are drawn to Oakland because the sequences of port calls in the Asia vessel strings tend to make Oakland the home of non-stop service to Asia. Because of this service advantage, over the years Oakland has developed valuable infrastructure for handling exports. For example, Oakland has excellent facilities in the way of trans-load centers trans-loading agricultural goods from rail cars and trucks to marine containers. As may be seen in Table 3, in 2006 Oakland hosted about 46% more TEU capacity making its last West Coast port of call than the San Pedro Bay ports hosted (i.e., 39.5% vs. 27% of Asia – West Coast vessel strings), and 2.4 times as much as the Puget Sound ports. From a transit time perspective, Oakland is preferred as an export harbor over both San Pedro Bay and Puget Sound; generally, 2- 4 days of transit time may be saved for California exports routed via Oakland in lieu of other West Coast ports, depending on the vessel string. For

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<sup>7</sup> Source: Port of Oakland web site, [http://www.portofoakland.com/maritime/facts\\_cargo.asp](http://www.portofoakland.com/maritime/facts_cargo.asp).

<sup>8</sup> The vehicles category includes very little in the way of automobiles. New automobiles are mostly transported by Ro-Ro (Roll-on, Roll-off) vessels. In the Bay Area, such vessels call at Richmond and Benicia.

perishable commodities like fruit, meat, or hides and skins, this is especially attractive. In view of this transit time advantage, the 0.13% estimate above must be substantially reduced.

Non-perishable commodities also are attracted to Oakland by this transit time savings, if one considers the inventory carrying costs involved. To be conservative, let's assume only 2 days of transit time are saved on average by using the Port of Oakland for exports from California or inland regions compared to alternative West Coast ports. Let's assume a high-cube forty-foot marine container, which has 2,700 cubic feet of cargo space, is used for exports. Let's assume the BCO's inventory carrying cost rate is 15% per year. Let's re-visit the exporters sited in the Central Valley at a latitude with equal truck rates to the Port of Oakland and the San Pedro Bay ports, i.e., the exporter is neutral between using the alternative ports if only transportation cost is considered. We now pose the question: What declared value per cubic foot of exports would make the extra SFBP costs of \$1.22 per container equivalent to the increment in inventory costs associated with diverting the exports to San Pedro Bay? For the foregoing figures, the answer is \$0.55 per cubic foot in declared value.<sup>9</sup> This is an extremely low value. Among all 99 commodity codes maintained by US Customs, the lowest average declared value per cubic foot is for waste paper and scrap corrugated, which has an average declared value of \$1.08 per cubic foot, almost twice the threshold computed above. That is, for all 99 commodity types, the additional inventory financing expenses associated with diverting California-originated containerized exports to ports other than Oakland easily outweigh the extra \$1.22 per forty-foot container charge at Oakland.

For exporters located in regions east of the Rockies, let us assume transportation costs and transit times to alternative West Coast ports are comparable. Then by the foregoing analysis, only those with goods valued at less than \$0.55 per cubic foot would be inclined to stop using Oakland as their export port. As noted above, all commodity types have average declared values much greater than this.

In summary, the changes in surcharges and tonnage-based bar crossing fees proposed by the San Francisco Bar Pilots are equivalent to a 6.876% increase in fees assessed on the tonnage of container vessels. This increase is equivalent to a cost of \$1.22 per FEU loaded or discharged at the Port of Oakland. **If the additional \$1.22 per FEU in costs were passed through as surcharges to beneficial cargo owners, there would be no measurable impact on import and export volumes handled by the Port of Oakland.** The lack of impact stems from several factors: Routing imports consumed in the local region through alternative ports would be much more costly, and about 92% of imports at the Port of Oakland are consumed in the region for which Oakland is the closest port. In the 2006 peak year, only 8% of Oakland's total import volume was consumed out-of-region. This volume was routed by the steamship lines via the Port of Oakland primarily because of the need to balance rail flows of containers and avoid imbalance charges from the railroads that are much higher than the proposed SFBP fee increase. Oakland has a competitive advantage over other West Coast ports for exports because it is most often the last West Coast port of call in the steamship lines' vessel strings, and thus experiences strong export demand. Typically, exporters save 2-4 days in transit time by utilizing Oakland. The inventory carrying cost savings afforded by this transit time advantage is much greater than

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<sup>9</sup> This figure is calculated as follows:  $(\$1.22/\text{container}) / ((2,700 \text{ cu. ft.}/\text{container})(2 \text{ days})(0.15/365 \text{ \$ per \$ per day})) = \$0.55 \text{ per cu. ft.}$



\$1.22 per FEU for all commodities handled at the Port of Oakland. Thus exports are also resilient to the proposed fee increase.

**Table 1**  
**S. F. Bar Pilot Tonnage Fees for Bar Crossings by Container Vessels, Port of Oakland**  
**Container Volumes and Allocated Cost Per TEU**

<b>Year</b>	<b>SFBP Fees<sup>10</sup></b>	<b>No. of Bar Crossings<sup>6</sup></b>	<b>TEUs<sup>11</sup></b>	<b>Cost Per TEU</b>
2009	\$19,131,275	3,567	2,045,211	\$9.35
2010	\$20,616,109	3,781	2,330,214	\$8.85

**Table 2**  
**Share of 2009 Imports at Port of Oakland by Country<sup>12</sup>**

<b>Country</b>	<b>% Share of Imports (Declared Value Basis)</b>
China	44.2
Japan	12.4
Taiwan	4.2
Australia	3.9
Vietnam	2.8
Thailand	2.7
Indonesia	2
S. Korea	1.6
Malaysia	1.5
New Zealand	1.3
India	1.0
Philippines	1.0
Singapore	1.0
Bangladesh	0.8
All other	19.6
Asia subtotal	80.4

<sup>10</sup> Source: Private Communication from S. F. Bar Pilots.

<sup>11</sup> Source: Port of Oakland web site, [http://www.portofoakland.com/maritime/facts\\_cargo.asp](http://www.portofoakland.com/maritime/facts_cargo.asp).

<sup>12</sup> Source: Port of Oakland web site, [http://www.portofoakland.com/maritime/facts\\_trade\\_02.asp](http://www.portofoakland.com/maritime/facts_trade_02.asp).

**Table 3**  
**Distribution of Summer, 2006 Vessel Strings Calling at Asian Ports and the Port of Oakland<sup>13</sup>**

Type of String	% of TEU Capacity Among All Asian Strings Calling at Oakland	% of TEU Capacity Among All Asian Strings Calling at West Coast Ports
Oakland is First West Coast Port of Call	12.9	6.5
Oakland Call is After San Pedro Bay Call	81.8	41.4
Oakland Call is After Puget Sound Call	5.3	2.0
No Oakland Call	--	50.1
Total	100.0	100.0
Oakland is Last West Coast Port of Call		39.5
San Pedro Bay is Last West Coast Port of Call		27.0
Puget Sound or Portland is Last West Coast Port of Call		16.2
Canadian or Mexican Port is Last West Coast Port of Call		17.3
Total		100.0

<sup>13</sup> Source: Steamship line public schedules.

**Table 4**  
**2009 Exports Via the Port of Oakland<sup>14</sup>**

<b>Commodity</b>	<b>Total Declared Value (\$)</b>	<b>% Share</b>
Edible fruits and nuts	1,802,488,605	17.5
Meat	1,387,402,038	13.4
Machinery	652,966,766	6.3
Beverages	546,447,853	5.3
Inorganic chemicals and rare earth metals	521,713,711	5.1
Vehicles	472,425,475	4.6
Cereals	420,587,190	4.1
Electric machinery	408,922,836	4.0
Medical instruments	363,486,419	3.5
Misc. chemical products	275,086,168	2.7
Organic chemicals	259,947,329	2.5
Plastics	231,478,276	2.2
Aluminum	202,056,221	2.0
Hides and skins	201,052,502	2.0
Iron and steel	185,612,282	1.8
All other	2,388,007,149	23.1

<sup>14</sup> Source: Port of Oakland web site, [http://www.portofoakland.com/maritime/facts\\_comm\\_02.asp](http://www.portofoakland.com/maritime/facts_comm_02.asp).

BEFORE THE BOARD OF PILOT COMMISSIONERS  
FOR THE BAYS OF SAN FRANCISCO, SAN PABLO AND SUISUN

In Re the Petition of the	)	DECLARATION OF
San Francisco Bar Pilots For	)	FORREST BOOTH
Fuel and Rent Surcharges and a	)	
Change in Pilotage Rates	)	
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I, Forrest Booth, declare as follows:

1. Attached hereto and marked as Exhibits A through X, respectively, are true and correct copies of the following documents:
2. Exhibit A -- an article dated February 22, 2011 in the *Oil & Gas Journal*, reprinted from its website.
3. Exhibit B -- an article dated February 23, 2011 from *American Shipper*, reprinted from its website.
4. Exhibit C -- an article dated February 24, 2011 from Wells Fargo Securities - Equity Research, reprinted from its website.
5. Exhibit D -- an article dated November 30, 2010 from BIMCO (The Baltic And International Maritime Council), reprinted from its website.
6. Exhibit E -- an article dated February 6, 2010 from Bloomberg News *JournalStar*, reprinted from its website.
7. Exhibit F -- an article dated January 11, 2011 from the *Pacific Maritime Magazine Online*, reprinted from its website.
8. Exhibit G -- an article dated January 29, 2009 from the *San Francisco Chronicle's* SFGate, reprinted from its website.
9. Exhibit H -- an article from the February 2011 edition of *Pacific Maritime* magazine, page 18.
10. Exhibit I -- a paper entitled "The Criminalization of Maritime Accidents", authored by prominent admiralty lawyer Michael G. Chalos.
11. Exhibit J -- a press release from the United States Department of Justice, dated July 17, 2009, reprinted from its website.

12. Exhibit K -- a letter from attorneys Flynn, Delich & Wise, LLP dated October 11, 2010, addressed to K. Michael Miller, President, Board of Pilot Commissioners (without attachments).
13. Exhibit L -- a letter jointly written by Captain Peter McIsaac, Port Agent of the San Francisco Bar Pilots and John Berg, Vice President of the Pacific Merchant Shipping Association, to Senator Don Perata, dated June 3, 2002.
14. Exhibit M -- a table of Container Statistics for the years 1990 to 2010, reflecting the number of TEU's handled at the Port of Oakland, reprinted from the Port of Oakland's website.
15. Exhibit N -- an article dated February 26, 2011 from the Honolulu *Star Advertiser*, reprinted from its website.
16. Exhibit O -- an article dated February 28, 2011 from the *Journal of Commerce*, reprinted from its website.
17. Exhibit P -- an article dated January 19, 2011 from the *Journal of Commerce*, reprinted from its website.
18. Exhibit Q -- an article from the November 2010 edition of *Pacific Maritime* magazine, page 39.
19. Exhibit R -- a chart of the Ten Year Trend in Tonnage for the Port of Stockton, California for 2000 to 2009, published by the California Association of Port Authorities and reprinted from its website.
20. Exhibit S -- The cover page and page 63 of the 2006 Annual Report of the Pacific Maritime Association.
21. Exhibit T -- an article dated February 21, 2011 from *American Shipper*, reprinted from its website.
22. Exhibit U -- an article dated November 30, 2010 from the *Journal of Commerce*, reprinted from its website.
23. Exhibit V -- an article dated January 31, 2011 from the *Journal of Commerce*, reprinted from its website.
24. Exhibit W -- a graph of the national price for diesel fuel for the period March 1, 2010 to February 28, 2011, published by the U.S. Department of Energy, Energy Information Administration.
25. Exhibit X -- an article dated March 3, 2011 from the *New York Post*, reprinted from its website.

26. Exhibit Y -- a graph of the Industrial Price Index, a measure of inflation, dated February 28, 2011, published by the *Journal of Commerce*, reprinted from its website.

27. Exhibit Z -- an announcement dated December 1, 2010 by OOCL of fuel surcharges, reprinted from its website.

28. Exhibit AA -- an article dated December 3, 2010 from *Signals*, reprinted from its website.

I declare under penalty of perjury under the laws of the State of California at San Francisco, California that the foregoing is true and correct on the 4<sup>th</sup> date of March, 2011.

  
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## MARKET WATCH: Brent crude closes above \$105/bbl on MENA strife

Feb 22, 2011

Sam Fletcher

OGJ Senior Writer

**HOUSTON, Feb. 22 --** In London, the April IPE contract for North Sea Brent crude shot past \$108/bbl in intraday trading Feb. 21 before closing at \$105.74/bbl, up \$3.22 for the day because of continued strife in the Middle East and North Africa (MENA), especially in Libya where strongman Moammar Gadhafi vowed to become a "martyr" rather than submit to protestors demanding his ouster.

The New York futures market was closed Feb. 21 for Presidents Day, a US holiday. But benchmark US crude apparently climbed above \$91/bbl in unofficial trading, analysts reported.

Olivier Jakob at Petromatrix, Zug, Switzerland, said, "The global macro situation is a picture where equities (apart from the financial sector) are back close to or above their 2007 peaks, where volatility in equities is minimal, where commodities are back close to or above their 2008 peaks, where input costs are starting to increase and will eat into the profit margins, where inflation is in many countries above target rates, where unemployment is not being solved, and where global unrest has reached historic proportions. For now, the energy focus on the unrest is on the threat to supply operations, but it is also clear that following the unrest some countries will move back a few months if not a few years in terms of economic growth."

In Houston, analysts at Raymond James & Associates Inc. said, "As Libya is Africa's largest oil producer, the risk of supply disruptions affecting global markets is significantly higher relative to the crisis in Egypt."

Other countries most at risk for "contagion" of political instability include Algeria, Jordan, Morocco, and Syria. Various protests have been reported in these countries in the past few weeks, with Libya now facing the most acute turmoil, said James Zhang at Standard New York Securities Inc., the Standard Bank Group.

A member of the Organization of Petroleum Exporting Countries, Libya produced 1.6 million b/d of crude oil in 2010 and exported 1.5 million b/d, mostly to Europe. "Industrial sources suggested yesterday that Libya's oil ports have suspended loading and discharging and that Sarir crude production had been shut down," Zhang reported. "The situation will most likely have a substantial impact on the market in the short term. The unrest in Libya is also likely to slow down the growth of global oil supply in the medium term as well."

The average price for OPEC's basket of 12 reference crudes gained \$1.51 to \$100.59/bbl on Feb. 21.

Although Libya has the largest proven oil reserve among all African countries, its oil production has been lagging. "Only recently, the National Oil Corp. of Libya had to postpone the timeline for its 3 million b/d production target to 2017. Libya's oil industry relies heavily on foreign oil companies to develop its oil fields. Currently, many foreign oil companies have already suspended their operations in this country, which will delay Libya's oil production growth further," said Zhang.

Over the weekend, Gadhafi's son and rumored heir apparent warned Libya is on the brink of civil war and \$200 billion worth of energy projects are imperiled by the conflict.

At Barclays Capital Commodities Research, analysts reported, "With two long-standing Arab heads of state already swept aside by street protests (in Tunisia and Egypt), the unprecedented wave of popular unrest in the region shows no signs of receding in the near term. Libya's Moammar Gadhafi appears to be in the most immediate peril, with the eastern town of Benghazi effectively falling into the hands of the demonstrators over the weekend and with several government buildings on fire [Feb. 21] in Tripoli. As a result, market focus is firmly on Libya currently, although unrest in other parts of the MENA region continues."

However, Barclays Capital analysts pointed out, "While the events in Libya are undoubtedly of prime importance, they do provide a form of red herring for the oil market. We believe the unrest in Bahrain, though not dominating the current news cycle, may be of far greater importance to the strategic balance of power in the Middle East and to the oil market."

Although not a major oil producer itself, Bahrain's influence on the oil market reverberates through its importance in Saudi Arabia. "Until the sandstorm [of unrest] that is currently running through the region settles down, the oil markets are likely to remain secondary in importance, irrespective of the level of price that oil trades at," said Barclays Capital analysts.

The odds for limited producer control over the upside generating a \$100/bbl average "is not tenable given the level of spare capacity available in key producing nations," they said. But recent deterioration in the Saudi-US relationship "may reshuffle those cards slightly." They said, "The key producers could well be somewhat on the slow side in terms of acting to rein-in the upside, with ultimate control reestablished at higher price levels than \$100. Clearly, the perfect storm of fundamental factors together with rising political uprisings creates an environment of upside risk for our price forecasts for 2011 but ever-growing ease with our forecast of \$135/bbl (for Brent) for the medium term (2015)."

Zhang said, "Currently the situation inside Libya remains fluid. Furthermore, the risk of contagion for further political instability in the MENA region remains high. This heightens the threat of further price spikes, which poses an increasing risk to the global economy." He said strategic petroleum reserves in the US and other Western countries should be put on standby to deal with supply losses and higher prices.

"Crude is expected to remain propped-up on increased geopolitical risk and on concerns that the popular unrest in the Middle East could engulf Iran and Saudi Arabia as well," said Anuj Sharma, research analyst at Pritchard Capital Partners

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LLC in Houston. "The autocratic regimes in the Middle East (such as Iran) could even escalate tensions with Israel to divert attention from their domestic turmoil. [We] expect the events in the Middle East to continue to dictate price-direction for the time being."

In other news, Apache Corp. and Chevron Corp. halted oil and gas production in Western Australia under threat from Cyclone Carlos.

Contact Sam Fletcher at [samf@ogjonline.com](mailto:samf@ogjonline.com).

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### Maersk Line posts record \$2.8 billion '10 profit

Maersk Line on Wednesday announced record operating profits of \$2.8 billion, a massive \$4.8 billion swing from the \$2 billion the line lost in 2009.

Perhaps crystallizing just how successful the Danish line, and market leader, was last year, it made nearly \$2 billion more in 2010 than it did in 2009, when Maersk took home around \$600 million in profit, despite rate and volume levels lower than 2008.

Revenue for the container line grew 30.7 percent in 2010 to \$26 billion. Volume grew 5 percent to 14.6 million TEUs, while its average global freight rates rose 29 percent to \$1,532 per TEU.

The A.P. Moller - Maersk Group, parent company of the container line, saw profit spike to \$5 billion, after losing \$1 billion in 2009. Group revenue was up 15.5 percent to \$56.1 billion.

Unit costs for the line fell 4 percent and bunker consumption 10 percent -- helped not just by slow steaming, but also due to better maneuvering and loading of vessels, Maersk said.

"It is our best results ever and we are very pleased with that," Group Chief Executive Nils Andersen said Wednesday in a conference call to discuss the results. "What is also positive is that even though the rates and volumes were lower in 2010 than in 2008, we had a better result. A \$2 billion improvement, gained from internal improvement in the container shipping business."

Andersen said the company has stripped out \$3 billion in cost in recent years.

"It's made us more competitive," he said. "It makes us confident that results are not just coming from events on the outside."

On Monday Maersk announced it was ordering 10 18,000-TEU vessels, with an option for up to 20 more such ships, an order that would cost close to \$6 billion if all the vessels are delivered to Maersk.

But Andersen stressed Wednesday the company is in a strong cash position.

"We still have strong cash flow," he said. "Our debt is down to 12.4 percent, which is slightly more than one year's cash flow from operations. That allows us to be quite aggressive on the investment side. We believe we have exciting businesses to invest in. Over time, we will try to get a good balance between earnings and capex (capital expenditure) levels. That means we will keep a good cash flow and liquidity position."

When asked how substantial the company's capital expenditure program will be this year, Andersen said a lot depends on how many vessels end up being ordered.

"It's too early to say exactly what the capex will be in 2011," he said. "If we order 30 ships, it obviously will be a high level. If we only take 10, it will be much lower."

At the end of 2010, the company has \$12.4 billion in interest-bearing debt, while operating cash flow for 2010 was \$10.1 billion. The group has \$66.8 billion in assets and equity of \$34.4 billion.

Andersen stressed on numerous occasions that Maersk would focus on opportunities in what he termed "growth markets" -- he said 40 percent of the company's turnover comes from these markets and that a platform has been built in regions such as South America and Africa to grow substantially.

Meanwhile, Andersen admitted Maersk Line lost some market share in 2010, a fact he attributed to the carrier's relatively small order book coming out of the economic crisis, compared to some of its rivals. The massive ship order placed earlier this week can be seen as a way to redress that issue.

The new ships are a "major step forward in terms of competitiveness, but also in CO2 emissions," he said. "Irrespective of whatever regulations on fuel consumption and CO2 emissions arise, this should place us in a good position."

He said Maersk expects supply to marginally outstrip demand in 2010, but that by 2013 (when the first 18,000-TEU ships are due to be delivered), the company expects the reverse to be the case.

When asked about whether a shortage of containers might be a problem in 2011 as it was last year, Andersen said he thinks not.

"There was a lack of ordering in 2009, but also carriers were unprepared for the turnaround" in early 2010, he said. "Carriers had boxes in places they didn't need them. We, for instance, had a lot of boxes in Europe. A shortage of boxes should not be a problem in general in 2011."

As for the group's other logistics-oriented businesses, operating profit for terminal operator APMT Terminals spiked to \$911 million, a 63.6 percent increase over 2009. APMT revenue rose 0.2 percent to \$4.3 billion, while the volume handled by APMT facilities rose 2 percent. The company said the increase would be 7 percent if the effect of six APMT divested facilities are considered.

Andersen said the percentage of non-Maersk Line container business handled by APMT rose from 41 percent in 2009 to 44 percent in 2010.

Maersk's logistics and forwarding division, Damco, saw operating profits rise from \$22 million in 2009 to \$75 million on a 21.1 percent increase in revenue, to \$2.7 billion.

As for the effect of Middle East political protests, Andersen said the company is not worried about its long-term prospects. The group maintains a sizable presence throughout the Middle East in its container shipping, logistics, terminal, and oil and gas businesses.

"We're not in general worried about the situation in the Middle East," he said. "There may be temporary disruptions in certain locations, but we don't consider it a risk to our operations in Qatar or elsewhere."

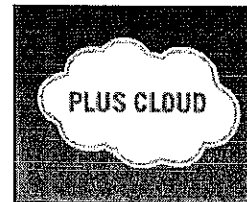
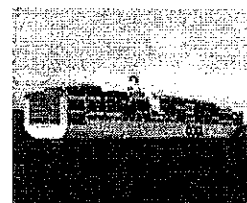
Andersen was reticent to draw too many conclusions about 2011, but said he expects group and container line profits to be smaller than in 2010.

"It's too early to answer," Andersen said. "We'll have more specific guidance for 2011 after the first quarter once annual contract negotiations are concluded. We expect rates to be below 2010 levels, but exactly where, we're not giving a statement on that. We don't expect return to 2009 figures or anything close to that." -- Eric Johnson

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February 24, 2011

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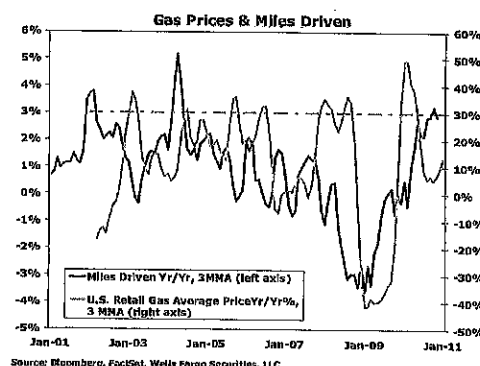
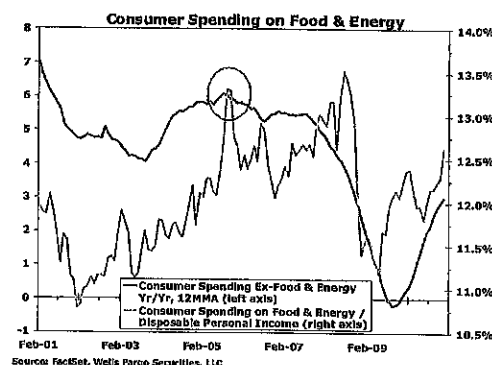


### The "Tipping Point" For Consumption

Food And Energy Grabbing Wallet Share

- Rising food and energy prices are already eating into consumer wallets, suggesting the "tipping point" for consumption may sneak up on investors early this year. At 12.5% of disposable income, food and energy consumption is already nearing levels that coincided with the beginning of the core consumer spending slowdown in the last cycle. Given slow employment and disposable income gains so far, this spring could turn out to be a difficult time for U.S. consumers to maintain spending habits. Watch \$3.60 at the pump (30% yr/yr growth) for an alteration to driving patterns this spring—a signal of gas prices negatively affecting economic activity.
- Food and energy costs were already 12.5% of disposable income by the end of last year thanks to rising food costs. The recent jump in oil prices may add enough pressure on consumers to result in much slower core consumption growth in the near term. The tipping point for consumption in the last cycle was in 2005—when food and energy reached 13% of disposable income (top graph). Unless employment growth picks up quickly, core consumption growth may be snuffed out at a significantly lower level this cycle. At the tipping point in 2005, core consumption growth was 6% yr/yr. In line with disposable income, core consumption is growing just 3% yr/yr.
- We find 30% yr/yr growth in retail gas prices was a fairly good predictor of a reduction in miles driven over the last several years. Each time the 30% yr/yr threshold was breached from 2004 to 2008, yr/yr driving miles declined. (bottom graph) At \$3.20, prices at the pump are up just 20% yr/yr. However, a level of \$3.60 for retail gasoline marks the 30% yr/yr threshold. If the recent jump in the oil price holds, \$3.60 seems a likely target for gas prices by the spring.

#### Equity Strategy



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## Worldwide supply and demand for seafarers

BIMCO and the International Shipping Federation (ISF) have published the results of their latest comprehensive study of the worldwide supply and demand for seafarers, presenting their conclusions, on 30 November, to governments attending the IMO Maritime Safety Committee in London. (Highlights from the report are available from the below link)

The worldwide supply of seafarers in 2010 is estimated to be 624,000 officers and 747,000 ratings, while the current worldwide demand for seafarers is 637,000 officers and 747,000 ratings.

The Chairman of the project's Steering Committee, Douglas Lang of Anglo Eastern, explained:

**“Our results suggest a situation of approximate balance between demand and supply for ratings, with a modest overall shortage of officers of about 2%. This does not, of course, mean that individual shipping companies are not experiencing serious recruitment problems, but simply that overall supply and demand are currently more or less in balance. This is perhaps not surprising given the sharp contraction in the demand for sea transport in 2009 combined with significant growth in total seafarer numbers.”**

The BIMCO/ISF study highlights that shortages are more acute in specialised sectors such as tankers and offshore support vessels. With regard to certain nationalities, there is an underlying concern about the current and future availability of senior officers. But while there is some evidence of continuing recruitment and retention problems, these are not as severe as envisaged by the last Update produced by BIMCO and ISF in 2005. Encouragingly, the data suggests a notable improvement in supply side numbers over the past 5 years, notably in China, India and the Philippines, but also in several OECD countries.

The 2010 Update also presents various global supply/demand balance scenarios for the next decade.

Mr Lang remarked:

**“There are many uncertainties, but our results indicate that the industry will most probably face a tightening labour market, with recurrent shortages for officers, particularly as shipping markets recover. Unless measures are taken to ensure a continued rapid growth in qualified seafarer numbers, especially for officers, and/or to reduce wastage from the industry, existing shortages are likely to intensify over the next decade. Supply appears likely to increase in many countries, but the positive trend that has been established for training and recruitment over the past few years must continue to be maintained to ensure a suitable future pool of qualified seafarers.”**

The 2010 Update is based on data collected from questionnaires sent to governments, shipping companies and crewing experts. It also incorporates the views and perceptions of senior executives in shipping companies and maritime administrations, and detailed statistical analysis provided by the Warwick Institute for Employment Research. Importantly, for

the first time, the study has been assisted by Dalian Maritime University which has helped obtain input from Asian countries where it had previously been difficult to obtain definitive data.

The full report on the *BIMCO/ISF 2010 Update on the Worldwide Demand Supply of and Demand for Seafarers* will be available in December from BIMCO and ISF for €140 or GBP£125.

For more details please contact:

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Wider Panama Canal could change shipping

BY KYUNGHEE PARK and ERIC SABO Bloomberg News JournalStar.com | Posted: Saturday, February 6, 2010 10:15 pm | No Comments Posted

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Chinese toys and sneakers headed to Walmart and Target on the East Coast may bypass Warren Buffett's \$33.8 billion railway as the expansion of the Panama Canal slashes the cost of shipping them by sea.

The deeper, wider canal will allow A.P. Moeller-Maersk, China Ocean Shipping and other lines to ship more cargo directly to New York and Boston instead of unloading it on the West Coast for trains and trucks to finish the journey east. That could save exporters 30 percent, the canal operator said.

The \$5.25 billion Panama Canal project, scheduled for completion during its centennial in 2014, may take business from ports including Los Angeles and Seattle, and railroads including Berkshire Hathaway Inc.'s Burlington Northern Santa Fe Corp. It costs as much as \$1,000 more per cargo container to use trains than ships, said Lee Sokje, a shipbuilding analyst at Mirae Asset Securities in Seoul.

"It is inevitable that railways, such as Burlington Northern, will lose some of their cargo once the Panama Canal is expanded," said Jee Heon-seok, a shipping analyst for NH Investment & Securities in Seoul. "Many more containers can be moved in a single voyage on a ship than going through the West Coast ports."



China, poised to overtake Japan this year as the world's second-biggest economy, may boost exports by 20 percent during the first quarter as the global economy recovers, according to Macquarie Securities and Royal Bank of Scotland Group.

China Cosco Holdings Co., Asia's biggest shipping company by market value, and 14 other container lines said Jan. 14 they expect a "significant" increase in transpacific cargo this year on rising U.S. consumer sentiment.

That prospective growth spurred Berkshire to pay \$26 billion for the remaining 77.4 percent of Fort Worth, Texas- based Burlington Northern it didn't already own. Buffett, the Berkshire chairman, said the largest U.S. railroad will benefit from "moving around more and more goods." The acquisition is pending and expected to be completed by March 31.

Burlington Northern customers in Gulf of Mexico ports - including Houston and Galveston, Texas - may benefit from more traffic going through a wider canal.

Buffett didn't respond to a request for comment. A Burlington Northern spokeswoman, Suann Lundsberg, said trains deliver cargo from the West Coast to the East Coast as many as nine days faster than ships using the canal.

Rail traffic is expected to continue growing, although probably at a slower rate than in the past, Lundsberg said.

"We know he doesn't make short-term investments," Art Wong, spokesman for the port in Long Beach, Calif., said of Buffett. "He must be making it because he thinks it's a great long-term investment."

About 43 percent of Asian cargo shipped to East Coast ports - including Savannah, Ga., and Jacksonville, Fla. - goes through the Panama Canal, said Rodolfo Sabonge, director of marketing for the Panama Canal Authority. That share may increase to 49 percent by 2025.

"It will become less expensive overall to ship through the canal," Sabonge said. "Savings could go up to 30 percent."

The expansion project, started in 2007, is building locks on both sides of the 50-mile canal, digging a new channel linking the locks and deepening the waterway connecting the Pacific Ocean with the Caribbean Sea.

Currently, ships loading fewer than 5,000 20-foot boxes use the canal. The expansion will accommodate vessels carrying about 12,600 containers and may generate cargo growth of about 5 percent a year, Sabonge said.

"It will, of course, help reduce costs for exporters to the U.S.," said Victor Fung, chairman of outsourcer Li & Fung, the world's biggest supplier of toys, clothes and furniture to retailers including Walmart, Target, Macy's and Marks & Spencer.

East Coast ports are readying for the changes. The Port Authority of New York and New Jersey is deepening more channels to 50 feet and considering options for a 78-year-old bridge between New Jersey and New York City that may be too low.

"Increasing numbers of big ships are anticipated at our port facilities following an expansion of the Panama Canal," the agency said in September.

Hanjin Shipping, South Korea's largest shipping company that operates two California terminals, is building its first East Coast terminal in Jacksonville to handle an increase in cargo through the canal. The facility opens in 2013. The ports around Charleston, S.C., are dredging to accommodate vessels carrying more than 8,000 20-foot containers.

Six ports on the west coast - Los Angeles, Long Beach and Oakland, in California; Seattle and Tacoma, in Washington; and Portland, Oregon - handle about 70 percent of containerized trade between Asia and the U.S., according to an Oct. 12 statement.

They are collaborating with Burlington Northern and Union Pacific to convince Asian exporters they are better options than the canal for reaching East Coast markets. They cite advantages including deep-water terminals, connections to inland transportation networks, and storage and distribution facilities.

Trains also use less fuel, reducing costs and carbon emissions, they said.

"We don't think those alternative gateways will go away," said Tay Yoshitani, chief executive officer for the Port of Seattle. "If we don't improve our competitiveness, we could lose a lot of cargo."

Bloomberg reporters Craig Trudell, Erik Holm and Frank Longid contributed to this article.

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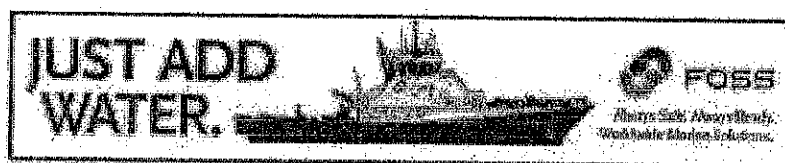
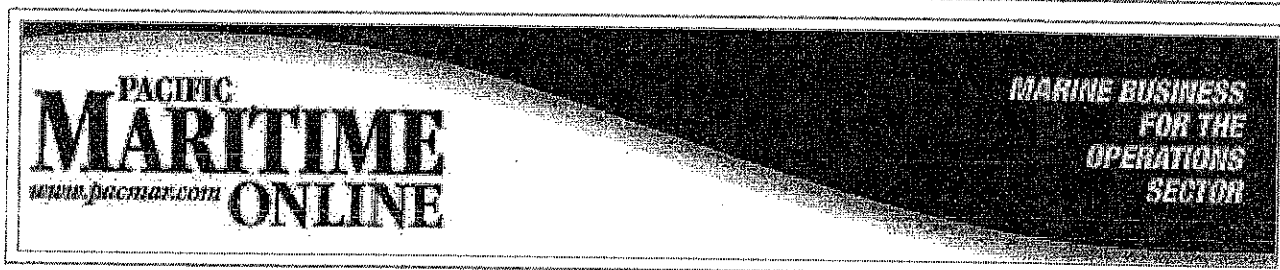
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TUESDAY, JANUARY 11, 2011

## America's Cup Could Shutter SF Bay Entrance to Commercial Traffic for Extended Daytime Periods

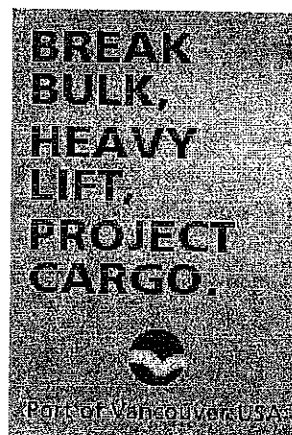
The proposed San Francisco Bay course for the America's Cup yacht race competition, designed to draw thousands of race watchers to shoreside venues by taking place just inside the entrance to the bay, will also, according to the United States Coast Guard, require shutting down all large commercial shipping in the bay during extended daytime periods for more than a week in 2012 and up to 40 days in 2013.

Organizers of the America's Cup event, who envision using the central Bay region between the Golden Gate, Oakland and Richmond Bridges as a kind of natural arena for race spectators with Alcatraz Island in the center, have asked the USCG to impose tight vessel traffic restrictions for commercial vessel transits through the racecourse during race hours.

According to the United States Coast Guard, the initial proposal by the race organizers would entail halting all large commercial vessels from moving in and out of the bay from 9 a.m. to 6 p.m. on race days.

The America's Cup events have been approved for San Francisco Bay for 2012 and 2013, though the exact course layout and dates are still fluid. The 2012 portion of the event, where challengers would face off in a competition for the Louis Vuitton Cup and the right to face off against America's Cup defenders, the Golden Gate Yacht

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Club. The event would return in 2013 for the actual America's Cup competition.

Under the current proposal the 2012 event, and any commercial traffic restriction, is likely to last from nine to 18 days during July or September, and the 2013 event could last up to 40 days.

The Coast Guard is currently in the very early stages of addressing the initial traffic restriction proposal from the race organizers. The federal agency plans to reach out to stakeholders of the shipping industry in an effort to minimize any disruptions the two events may cause to Bay Area commercial shipping. One such event will occur Thursday Jan. 13 at a full meeting of the Harbor Safety Committee of the San Francisco Bay Region. The public meeting will be held from 10 a.m. to noon at the Port of Richmond Harbormaster's Office located at 1340 Marina Way South in Richmond.

Despite the first race in the bay being nearly 18 months away, the Coast Guard plans to come up with its version of what restrictions may be needed during the race within the next several months.

The Coast Guard plans to use feedback from such events as Thursday's public HSC meeting to help the agency determine its response to the event organizers regarding race day traffic restrictions. Coast Guard officials said that while safety and security will be the number one issue playing into their decisions, the agency is also keenly aware of the potential disruptions such traffic restrictions may have on commercial traffic in the bay as well as the potential for cargo diversions caused by extended closures of the bay entrance.

Roughly eight to 10 cargo vessels a day move through the bay entrance during the summer months headed toward ports such as Stockton, Sacramento, Benicia, Richmond and Oakland, the third busiest container port on the West Coast. While many vessel arrivals occur too early in the morning to be impacted by the initially proposed 9 a.m. to 6 p.m. time frame, a similar percentage of all commercial vessel departures occur in the late afternoon and would be directly impacted by afternoon and evening traffic restrictions.

Organizers of the event claim that the America's Cup could bring as

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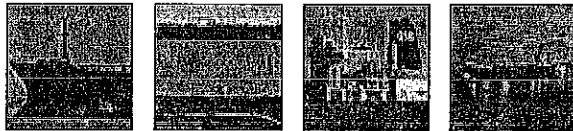
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**SFGate.com**

## Quick action by bar pilot kept tanker off rocks

Carl Nolte, Chronicle Staff Writer

Thursday, January 29, 2009

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**(01-28) 20:24 PST** -- Quick action by the ship pilot in control of the tanker Overseas Cleliamar helped prevent what could have been a serious accident in the Golden Gate when the ship suddenly lost all power at sunset Tuesday just after it passed under the Golden Gate Bridge.

Capt. Dave McCloy, a bar pilot for about a year, had just minutes to stop the tanker from crashing into the steep rockbound cliffs of the Marin Headlands just outside the Golden Gate.

McCloy had just ordered the ship's helm put slightly to the right. So when the Overseas Cleliamar lost power, it was headed for the rocks.

McCloy acted fast. He directed the crew of the tanker to lower the starboard anchor, one of two massive anchors carried on the bow. He had the anchor lowered only partially, so that it would take hold in shallower water close to the shore.

The water in the strait is too deep for ships to anchor, and the shoreline drops off steeply on the Marin side, so there is little shallow water close to shore. The ship had to come very close to rocky Point Diablo before the anchor took hold and stopped the ship.

But McCloy had little choice: Without power or steering, anchoring close to shore was his only option.

"Capt. McCloy did a great job," said Capt. Peter McIsaac, president of the San Francisco Bar Pilots Association, whose ship pilots are specially trained to guide ships through the bay.

### Unusual situation

He said McCloy faced a "very stressful" and unusual situation when the tanker had an electrical generator failure, shutting down power and steering.

The engines on ships will occasionally lose power, said Capt. Eric Dohm, a veteran tanker master and bar pilot, but it is "highly unusual" for a ship to lose both power and steering.

The ship regained power 10 minutes after the incident began, and was able to move back into the bay under its own power. It was inspected by a team of Coast Guard officials and divers Wednesday and will sail for its original destination once the Coast Guard says it is safe for the voyage to proceed.

The Overseas Cleliamar, which had unloaded its cargo of petroleum in Martinez, had no cargo aboard, but its fuel tanks were full of oil for the voyage from San Francisco Bay to its next port of call in Ecuador.

Tankers loaded with oil cargo are required to have tugboat escorts while moving in San Francisco Bay. But because the Overseas Cleliamar had no oil cargo, it did not have a tug escort. Nonetheless, when trouble developed, a tug named Z Four, which was in the vicinity, quickly came to the assistance of the ship. Five other tugs and the Coast Guard also responded to the emergency.

Observers on the Golden Gate Bridge watched the whole drama with growing foreboding. Alex Rau, a San Francisco resident who often rides his bike across the bridge and watches ships passing underneath, said he could see this one was in big trouble.

"I've never seen a ship that close to shore before," Rau said.

Pictures posted on the Internet also show how close the tanker came to running aground. In some pictures, it appears that the Overseas Cleliamar had hit the rocks.

But McCloy and the ship's crew acted just in time. "Everybody on that ship did a good job," said Dohm, who went aboard the Overseas Cleliamar to assist McCloy after the tanker was anchored.

In the moments after the tanker lost power, the ship, which displaces 38,653 tons and is 741 feet long, was drifting in one of the most dangerous parts of the bay, a narrow strait lined by cliffs and rocks.

The currents at the Golden Gate are particularly strong and constantly changing. When the engine of the Overseas Cleliamar conked out, the current in the strait was moving out to sea at about 3 knots, fast enough to affect the movement of a ship. At 351 feet to bottom, that part of the Golden Gate is also the deepest part of the bay, too deep to safely anchor a ship.

"It is one of the worst places," said Joan Lundstrom, chair of the Harbor Safety Committee for the Bay Region.

The area was the scene of one of the bay's worst oil spills when two Standard Oil tankers collided under the Golden Gate Bridge in 1971, spilling 840,000 gallons of crude oil and killing more than 4,000 birds.

On the advice of his lawyer, McCloy spoke only to officials investigating the incident and made no public statements.

Dohm said McCloy had extensive experience on tanker ships and tug boats.

### **Veteran mariners**

Ship pilots are veteran mariners with comprehensive local knowledge of the geography of the bay and its tides and currents. Both McIsaac, the head of the bar pilots, and Dohm said that pilots have been put through extensive training for just such an emergency, including training on electronic equipment at the California Maritime Academy in Vallejo that simulates emergency situations and on scale model ships at a pilot training facility in France.

The close call Tuesday was in contrast to an accident in November 2007, when the container ship Cosco Busan crashed into the base of one of the towers of the Bay Bridge and spilled 50,000 gallons of fuel oil. The state pilot commission's investigators concluded that accident was the result of pilot error. Capt. John Cota, who has since retired and faces criminal charges in the case, was the pilot.

The Overseas Cleliamar, which carries petroleum products, is registered in the Marshall Islands, a small South Pacific nation, and has an international crew.

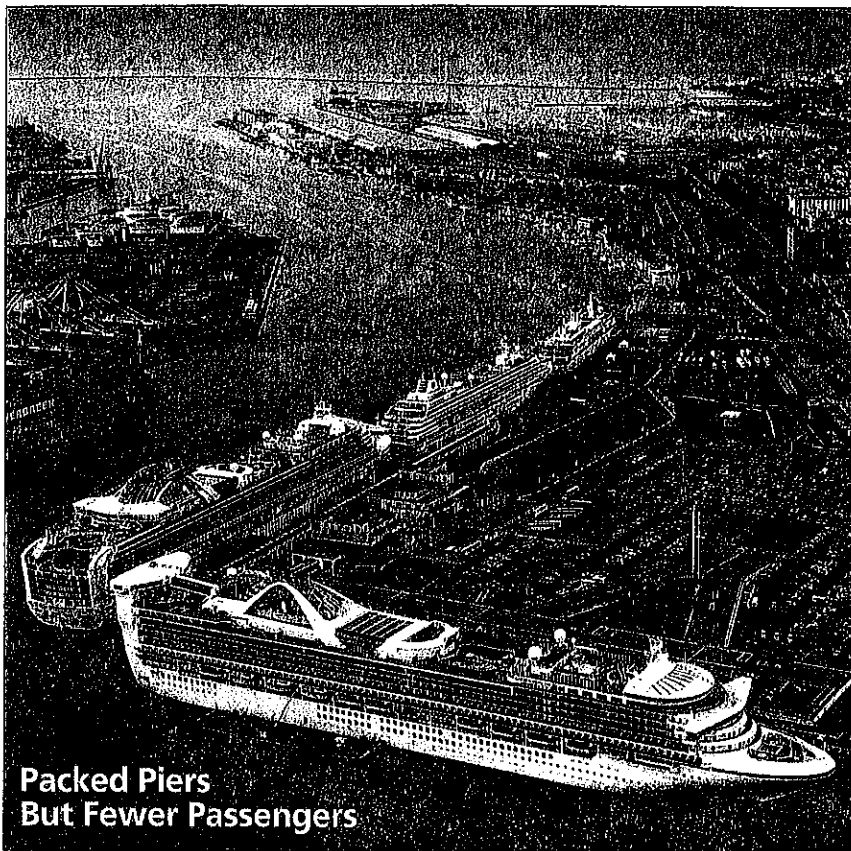
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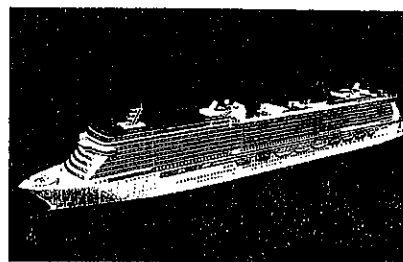


### Packed Piers But Fewer Passengers

Four cruise ships were docked simultaneously at the Port of Los Angeles World Cruise Center on January 5 while some 13,000 passengers were handled to and from the vessels *Golden Princess*, *Sapphire Princess*, *Crystal Symphony* and *Deutschland*. Although cruise traffic remains important for the California gateway it has been falling off steadily since the start of the recession, with only 153 ships and 755,000 passengers handled in 2010, a 36 percent decline from 2008, and only 144 ships and 605,000 passengers expected this year. **ENR**

### NCL Orders 143,500-gt Twins

Following several months of rumors Norwegian Cruise Line (NCL) has confirmed its order for two 143,500-gt cruise ships from Germany's Meyer Werft for delivery in spring 2013 and spring 2014. The Miami-based company will pay \$1.682 billion "en bloc" for the twin



Artist's rendering of new NCL ships which will accommodate 4,000 passengers each. Photo courtesy of NCL.

4,000-passenger newbuildings, equating to an all-in cost of around \$210,250 per berth. Commenting on the order, NCL's CEO, Kevin Sheehan, said "Our decision to add two new ships reflects the significant progress we have made in improving our operating performance and repositioning the company, as well as the strong demand we are seeing for *Norwegian Epic*."

The latter ship, NCL's largest to date, debuted last summer and has enjoyed steady bookings. The NCL order gives Meyer Werft the healthiest orderbook among European cruise ship builders, with two vessels under construction for Disney Cruise Line, two more for Celebrity Cruises, three for Germany's AIDA group and the latest two NCL orders.

Italy's Fincantieri is in second place after having won a one-ship order for Carnival Cruise Line late last year and two more for Princess Cruises earlier this year. STX Europe, which recently delivered the world's largest cruise ship, *Allure of the Seas*, has failed to win further cruise ship orders for its Scandinavian yards, although its French division, operating as STX France, has won orders for two cruise ships from MSC Cruises. **ENR**

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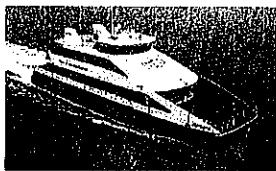
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## **THE CRIMINALIZATION OF MARITIME ACCIDENTS**

By: Michael G. Chalos, Esq.  
George M. Chalos, Esq.

On March 24, 1989, the EXXON VALDEZ ran aground on Bligh Reef and spilled over 11 million gallons of crude oil into the pristine waters of Prince William Sound in Alaska. This was the largest oil spill in American history. The EXXON VALDEZ was a watershed event which has forever changed the way the American people, government, environmentalists, media and industry view and deal with oil pollution resulting from maritime accidents.

Prior to the grounding of the EXXON VALDEZ, mariners, operators, managers, or other shore personnel never dreamed of criminal penalties resulting from maritime accidents caused by errors in navigation or management of a vessel. The criminal prosecution of Captain Hazelwood, Exxon Shipping Company and Exxon Corporation changed the rules dramatically. In addition to the typical civil liability exposure that ordinarily flows from any maritime accident, if such accident results in pollution there will likely be a criminal investigation. Additionally, depending on the facts, the media attention and the political climate, criminal charges may be leveled. Such charges, under the right circumstances, could be against individuals, such as crewmembers, or corporate officers of the company owning or operating the vessel, against the company itself, or, against the managers of the vessels.

In today's environmentally sensitive world, it is extremely important that everyone involved in the operation of a vessel, as well as their attorneys be aware of, and prepared for possible criminal investigation and exposure flowing from maritime accidents. Indeed, the criminal prosecution and conviction of crewmembers, shipowners, operators and managers will not only result in penalties possibly involving jail and substantial fines, but may also result in unlimited civil liability under the Oil Pollution Act of 1990 for the owner/operator, as well as the awarding of punitive damages in civil suits.

## **I. THE NATURE OF CRIMINAL LIABILITY**

In the United States,<sup>1</sup> there are two categories of statutes imposing criminal liability for pollution emanating from vessels. First, if there is pollution incidental to a maritime accident, criminal liability for violation of state and federal environmental statutes may be imposed. Second, regardless of whether there is pollution, state and federal general criminal statutes imposing criminal liability for damage to property, personal injury and loss of life will also come into play.

It is logical that in a criminal investigation of a maritime accident the focus of criminal liability under either of these categories will first be on the crewmembers, then on the shipowning corporation, the operator and/or manager and, ultimately, on corporate officers of such organizations.

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<sup>1</sup> While this paper deals mainly with the criminal statutes of the United States and prosecutions thereunder, the philosophy of criminal investigation, detention and prosecution of those responsible for oil spills, especially Masters of vessels, has been applied in recent years on a

Depending on the circumstances, the crewmembers navigating and controlling the vessel could bear criminal liability for their actions under both environmental statutes and general criminal statutes. For example, in the EXXON VALDEZ grounding, Captain Hazelwood was charged under environmental statutes for the negligent discharge of oil, as well as, under the Alaska general criminal statutes for criminal mischief, reckless endangerment and operating a vessel while intoxicated.<sup>2</sup> In addition, the shipowning corporation, operator and/or manager may be held vicariously liable for the acts of crewmembers acting within the scope of their employment if such acts constitute a violation of environmental statutes and, under certain circumstances, general criminal statutes. Additionally, corporate officers can be held criminally liable under environmental statutes merely because of their position of responsibility in the shipowning, operating or managing company, regardless of their actual knowledge or participation in any culpable conduct. This principle is commonly known as the "Responsible Corporate Officer Doctrine". Finally, corporate officers can be held criminally liable for violation of general criminal statutes depending on their actual knowledge of the facts surrounding the accident and whether they committed acts contributing to the accident.

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world-wide basis (i.e. KATINA P at Mozambique, HAVEN, Italy, ERIKA, France, NISSOS AMORGOS, Venezuela, FREJA JUTLANDIC, United States, etc).

<sup>2</sup> Captain Hazelwood was acquitted of all the felony charges and the more serious misdemeanor charges. He was convicted of one count of negligent discharge of oil a Class B misdemeanor for which he had to perform 1000 hours of community service. Despite his acquittal and the affirmation of the jury that the grounding was nothing more than a maritime accident, his criminal prosecution and the circus-like media atmosphere surrounding the spill and his subsequent trial

### A. *Mens Rea*

Historically, the courts have recognized that in order to be guilty of a crime a person must have a criminal intent or *mens rea*. Thus, in order to be guilty of a crime, one needs to have acted with wrongful purpose, knowledge of a particular wrong, or in a reckless and/or willful manner. The mental state necessary to trigger criminal liability will vary from statute to statute. Following the traditional rule, one would expect in maritime accidents resulting in pollution that criminal liability would be predicated upon the individual's mental status for: willful or knowing conduct, negligence, criminal negligence, recklessness and willful ignorance.

The basic notion running through the traditional criminal law was not to criminalize conduct absent a showing of evil intent or motive or that which would be traditionally considered a civil wrong, addressed by civil remedies. Most judicial interpretations of traditional general criminal statutes incorporated the concept of *mens rea*, even if not specifically provided for in the statute.

Unfortunately, this basic concept of law and fairness relating to minimal intent requirements was abandoned in the application of statutes dealing with the public welfare, including environmental statutes. These "public welfare" statutes were initially concerned with the regulation and protection of the public from adulterated food and drugs. Thus, the courts reasoned that the public safety outweighed the traditional

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has forever changed his life and livelihood. That is the harsh reality of the criminalization of maritime accidents.

requirement of criminal intent. Such statutes originally came into being to protect the public from the dangerous hazards resulting from the industrial revolution.

Because environmental laws are specifically designed to protect the public safety and welfare, they have been construed by the courts in a manner which maximizes public protection. Consistent with this approach, some criminal environmental statutes, such as the Refuse Act, are based on the notion of strict liability, or impose criminal liability for failure to comply with environmental regulations even when the violator was unaware that his or her conduct violated a law or regulation. In addition, some statutes impose criminal liability upon an individual corporate officer based on his or her position of responsibility in the corporation. According to this public welfare theory, the only mental state required, if any, is that which is explicitly stated in the statute, as opposed to being incorporated through traditional criminal common law. The application of such statutes may result in criminal liability for conduct that would not rise to the level of criminal conduct in traditional criminal statutes. The result being the criminalization of maritime accidents in a draconian and, for the most part, unfair manner.<sup>3</sup>

## **B. Basic Elements of Criminal Liability**

**1. Negligence.** In criminal law, there is a recognized distinction between criminal negligence and civil negligence. American courts dealing with common law

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<sup>3</sup> Recognizing that the United States model for environmental statutes and criminal prosecution of crew members and other potentially responsible individuals has spread worldwide, Intertanko has recently asked the IMO to draft and propose guidelines to all seafaring nations on the detention and prosecution of crew members after a spill incident.

criminal cases have held that the civil negligence standard of failure to use reasonable care is not enough to impose criminal liability. Rather, criminal negligence is required to impose criminal liability. A typical definition of criminal negligence is contained in the New York penal law:

A person acts with criminal negligence with respect to a result or circumstance when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Common sense dictates that these "substantial risk" and "gross deviation" requirements should apply in a maritime pollution incident where a general criminal statute containing negligence as an element is charged. However, the courts have held that where negligence is included as an element in an environmental statute, proof of simple negligence alone is enough for conviction. As an example, the criminal negligence provisions of the Clean Water Act have been construed to require only proof of simple negligence rather than gross negligence to sustain a criminal conviction. Obviously, the proof required to establish simple negligence is much less than the proof required to sustain a charge of gross negligence, and a conviction under such statutes is almost a foregone conclusion. It is precisely because it is so easy for the prosecutors to obtain a conviction under these statutes, that the prosecutions of crewmembers and company officials has become so prevalent.

**2. Recklessness.** Reckless conduct demands a higher level of culpable conduct than negligence. In traditional criminal statutes, the seriousness of a crime will be greater when there is reckless conduct, as opposed to where there is only criminally negligent conduct. The definition of reckless conduct is that:

[A] person acts recklessly with respect to a result or circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

While negligence is the failure to perceive a risk, recklessness is to perceive the risk but to consciously disregard it. Proving recklessness, even under the environmental statutes, is a more daunting task for prosecutors. As a result, while recklessness is a criminal charge that prosecutors pursue, convictions under this theory are more difficult to obtain. Criminal charges based on recklessness oftentimes are used as bargaining chips to obtain guilty pleas of negligence which, in turn, lead to the imposition of fines, the shipowner's (and/or their underwriters') cooperation in cleaning up and restoring the affected area, as well as, unlimited liability under OPA.

**3. Knowing Conduct.** While the public welfare approach to environmental crimes permits strict liability statutes, Congress has attempted to prevent the criminalization of innocent conduct by expressly including a knowledge element as part of the *mens rea* requirement in the majority of criminal environmental statutes. In order



for criminal liability to attach in this class of offenses, the act must be committed knowingly. An act is done knowingly if it is done intentionally or voluntarily. It is not necessary that the person be aware that the act is illegal. Also, there is a line of cases which hold that willful ignorance can be considered the equivalent of knowledge. This concept comes into play when there is evidence that a defendant, usually a supervisor, deliberately chooses to ignore what would have otherwise been obvious to him, or consciously avoids learning of illegal conduct.

**4. Corporate Liability.** It is an established principle in criminal law that a corporation can incur vicarious criminal liability for the actions of employees acting within the scope of their employment. Additionally, a corporation may have direct criminal liability for the acts of directors, officers or employees. Direct liability may be imposed if company policies or directions cause or contribute to the accident. For example, in a maritime accident, direct liability could result from being aware of and condoning crew incompetence, or a failure to properly train the crews, or a failure to implement and monitor compliance programs. Furthermore, corporate actions (depending upon privity, knowledge and/or control) can result in individual criminal liability for corporate officers as well as for the corporation.

In addition, a corporate officer may be held criminally liable for violation of an environmental statute, even if the officer did not participate in the illegal activity. Under the "Responsible Corporate Officer Doctrine", criminal liability can be imposed on corporate officers if they were in a position to know about or prevent the criminal act,

even if they did not actually commit the alleged crime. This doctrine is very harsh in that it can result in criminal liability being imposed on a corporate officer merely because of that officer's position of responsibility, as opposed to any particular conduct on the officer's part.

The Responsible Corporate Officer Doctrine should be of particular significance and concern to vessel operating and/or management personnel. Under this doctrine, if an officer or responsible individual at such companies actively engages in acts or omissions which result in a spill incident, that person and company can be charged with crimes under the various environmental statutes. For instance, if an individual at the management company knowingly hires an incompetent master or crewmember who is responsible for the spill, that individual and his company are at risk for criminal prosecution. If an individual at the management company fails to comply with the ISM Code, or fails to implement systems to monitor the vessel personnel's compliance with the ISM requirements, that individual and/or his company is at risk. If an individual at the vessel's operating company knows, or should have known, of a defect in the vessel's equipment which causes or exacerbates a spill incident, that individual and/or his company is at risk of criminal prosecution.<sup>4</sup>

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<sup>4</sup> In the NORTH CAPE spill incident off the coast of Rhode Island, the owning company, its President and Operations Manager were charged, and pled guilty, to criminal violations of various environmental statutes on the grounds that they knew, or should have known, that the anchoring system on the oil carrying barge that ultimately ran aground was not working properly. In that case, while the President and Operations Manager avoided jail time, they were required to pay huge fines and to bear the stigma of a criminal conviction. The tug master was also charged and convicted, but he paid a substantially smaller fine. A similar corporate officer prosecution occurred as a result of the MORRIS J. BERMAN spill in Puerto Rico.

The fact that an owning, operating, or managing company and its personnel are located outside the United States should be of little comfort. United States prosecutors have displayed surprising ingenuity, doggedness and resilience in pursuing those responsible for spill incidents in the United States, even minor ones. Under the right circumstances, United States prosecutors can (and will) confiscate vessels to collect fines and penalties, charge and hold vessel personnel pending trial, charge owning, operating and/or management companies and responsible corporate officers with violations of environmental regulations, even if such individuals are outside the United States. It should be borne in mind that the United States is a signatory to a number of extradition treaties with other countries and, if necessary, prosecutors can invoke such treaties to bring a responsible individual to the United States to stand trial for violations of environmental criminal statutes.

Under the circumstances, the best advice I can offer you as an owner, operator, or manager of a vessel calling the United States is to ensure that your procedures, directives, international and governmental regulations and requirements are properly implemented, monitored, carried out and complied with at all times. Establish a clear and comprehensive compliance program for your company and the vessels in its charge. Ensure that crews and employees are well trained, and that proper reporting procedures are developed. Avoid shortcuts and, most importantly, avoid burying your head in the sand if you know, or should know, something that requires attention is not being attended to. Keep accurate records, but avoid the proverbial "CYA" memos, unless absolutely

necessary. As a matter of policy, if you are in a position to implement a "no alcohol" policy while the vessel is in the United States waters, I would advise that you do it forthwith. Nothing creates a bigger stir or potential for criminal prosecution, fines, penalties and loss of limitation of liability, than a spill incident resulting from the use of alcohol by a crew member.

## **II. A PRIMER ON CRIMINAL INVESTIGATION AND PROSECUTION IN THE UNITED STATES**

What happens from a practical point of view after a maritime accident resulting in a spill? What can the mariner, shipowner, operator or manager expect to encounter in the United States when he or she is called out in the middle of the night to respond to a ship collision or grounding resulting in an oil spill? It is important to remember that the law enforcement personnel deployed after a spill incident come on the scene to determine whether a crime has been committed and who might bear criminal responsibility for its commission. The law enforcement officer's responsibility is to gather evidence; not to engage in a friendly fact-finding mission.

The cast of characters at a spill scene may include the Coast Guard, EPA, FBI, state police, United States Attorney, local District Attorney and the Attorney General. Each of these are separate and distinct organizations, with their own hierarchies, policies, and agenda. With the exception of the Coast Guard and the civil division of the EPA, the only purpose of the law enforcement personnel is to investigate and prosecute crimes. The criminal divisions of the EPA, FBI, and state police gather facts and evidence and bring it to the prosecutors for evaluation. The Coast Guard has a mixed purpose. It has

the responsibility to oversee and insure that a proper cleanup takes place, as well as to determine the cause of the accident in order to ensure safe operation of vessels and to take corrective administrative action if necessary. However, the Coast Guard has an obligation to turn over any evidence of criminal conduct it discovers in the course of its casualty investigation to the U.S. Attorney. Crew members, shipowners, operators, managers and their attorneys must be aware of this criminal investigatory role, and should be as careful in dealing with the Coast Guard casualty investigator as they would be in dealing with the FBI or State Police. The U.S. Attorney, District Attorney, and Attorney General are prosecutors who may play an advisory or supervisory role in a criminal investigation. They will make the ultimate decision of whether to prosecute.

What can be done to counteract the law enforcement investigation team? The most obvious task for the attorney responding to the scene would be to persuade the law enforcement personnel present that a crime has not been committed. Unfortunately, if there is significant oil in the water and/or loss of life or serious physical injury, this may be a very difficult task. Once it becomes apparent that the investigators will not rule out that a crime has been committed, it then becomes the job of the attorney to protect his clients' rights and certainly not to actively assist investigators to gather incriminating evidence.

In this respect, it is important to remember that no one on board a ship can or should be forced to speak to a law enforcement officer investigating the cause of the accident if there is a possibility that the person may incriminate himself by doing so. As

a matter of policy, shipowning companies, operators and/or managers should ensure that crews are not coerced by company officials to give statements to law enforcement officials on the scene.

Each crewmember (and, indeed, any corporate personnel that is a target of a criminal investigation) is entitled to consult with counsel and to have counsel present when being interviewed by law enforcement officials. The prudent and ideal procedure when there is likely criminal liability would be for an attorney engaged specifically to represent the crewmember to get on board and interview the crewmember involved in the accident as soon as possible after the accident. That attorney will make an initial determination as to whether the crewmember bears any personal criminal responsibility for the accident. If the crewmember does not have any personal liability, he can be made available for an interview with his attorney present. On the other hand, if the crewmember has real or even potential exposure to liability, such as if the crewmember was involved in the navigation and control of the vessel or in any way contributed to the accident, then the attorney should advise the crewmember to invoke his constitutional rights under the Fifth Amendment to the U.S. Constitution. Law enforcement officials will not be shocked if an attorney says he has advised his client not to speak. This is normal practice in a criminal investigation and is the expected advice to be given by a criminal defense attorney.

In addition to legal representation for the crewmembers when there is a potential for criminal liability, separate criminal legal representation should be provided for the

shipowning, operating or managing corporations to evaluate and protect against corporate liability. Tactically, this could be advantageous for the corporation because it also makes it clear that these corporations are not in charge of how the crewmembers are represented. It also avoids the appearance that the corporation is obstructing the investigation if some crewmembers choose to invoke their Fifth Amendment rights.

In summary, the most important thing for vessel owners, operators and managers to remember in the context of maritime accidents, is to be prepared for the possibility that they may become the subjects of a criminal investigation. In this regard, the companies and their personnel must be prepared, in advance, to deal with government investigations. Failing to do so will only make matters worse and increase the likelihood for civil and criminal liability. Advance training, a well-defined response plan, and preparation to deal with government investigations will invariably lessen the risk to the owner, operator, manager and crewmembers of criminal prosecution, fines and/or administrative actions.

### **III. THE RELATIONSHIP BETWEEN CRIMINAL LIABILITY AND CIVIL LIABILITY**

It is also important to consider the relationship between criminal liability and civil liability in a maritime accident situation. One can assume that in every major maritime accident where there is an oil spill and environmental impact, there will also be a number of civil cases against the shipowner, operator, possibly the management company and crewmembers for damages based on negligence, willful or reckless conduct.

Nearly all of the issues which could later be the basis for civil actions will be the same issues involved in most criminal prosecutions arising out of the maritime accident. Thus, since a criminal case will invariably be tried before the corresponding civil case, it is very important to preserve the viability of available civil defenses by defending vigorously any criminal prosecution of the crew, corporation or corporate officers arising out of the accident.

In practical terms, this means that long before the civil case even gets into serious discovery, the issues relating to negligence, recklessness and the specific facts regarding what happened will have already been determined by a court and jury. For instance, criminal conviction based on recklessness or negligence, because it is a finding beyond a reasonable doubt, could be introduced as a final determination of that issue in a subsequent civil trial. In other words, a party's civil liability, including liability for punitive damages, can be for all intents and purposes, decided by a criminal conviction arising out of the same incident dealing with the same issues and parties.

### **CONCLUSION**

For better or worse, the criminalization of maritime accidents has become a fact of life for shipowners, operators, managers and crewmembers, not only in the United States, but in a number of countries around the world. The trend for such prosecutions appears to be on the rise. As the world's population becomes more environmentally aware and sensitive, tolerance for maritime accidents resulting in pollution of the seas and environs becomes less and less. As a result, and because of enormous popular demand and support, prosecution of pollution incidents and polluters, even innocent ones,



does not appear to offend anyone's sensibilities, other than those in the maritime industry.

Under the circumstances, the industry needs to carefully implement and monitor procedures, practices and regulations to minimize the risk of maritime accidents and pollution. At the same time, the industry through its various trade organizations, must actively petition the governments and regulatory bodies around the world to decriminalize maritime accidents in the absence of criminal behavior.



Home » Briefing Room » Justice News

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**Department of Justice**

Office of Public Affairs

FOR IMMEDIATE RELEASE

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**Prison Sentence for Cosco Busan pilot**

*Pilot Sentenced to Serve 10 Months in Federal Prison*

WASHINGTON— John Joseph Cota, the pilot who caused the *Cosco Busan*, a 900-foot long container ship, to collide with the San Francisco Bay Bridge and discharge approximately 53,000 gallons of oil into San Francisco Bay, was today sentenced to serve 10 months in federal prison by U.S. District Court Judge Susan Illston for the Northern District of California, the Justice Department announced.

Cota, who was a licensed bar pilot at the time of the collision, gave commands that caused the 65,131-ton Hong Kong-registered ship to collide with the bridge on Nov. 7, 2007.

Cota was sentenced according to an agreement in which he pleaded guilty to negligently causing discharge of a harmful quantity of oil in violation of the Clean Water Act (CWA), as amended by the Oil Spill Act of 1990 – a law passed in the wake of the 1989 Exxon Valdez disaster – and to violating the Migratory Bird Treaty Act, by causing the death of protected species of migratory birds.

In papers filed in court, prosecutors told the judge that Captain Cota should receive a sentence of incarceration because he was "guilty of far more than a mere slip-up or an otherwise innocuous mistake that yielded unforeseeably grave damage. Rather, he made a series of intentional and negligent acts and omissions, both before and leading up to the incident that produced a disaster that, as widespread as it was, could have had even worse consequences."

"Captain Cota abandoned ship by not following required safety procedures which then resulted in an environmental disaster" said John C. Cruden, Acting Assistant Attorney for the Justice Department's Environment and Natural Resources Division.

"The court's sentence of John Cota should serve as a deterrent to shipping companies and mariners who think violating the environmental laws that protect our nation's waterways will go undetected or unpunished," said Joseph P. Russoniello, U.S. Attorney for the Northern District of California. "They will be vigorously prosecuted."

Prosecutors provided the court with a list of Cota's errors that included the following:

- Captain Cota left in extreme fog that was so thick that the bow of the vessel was not visible from the bridge. Captain Cota made the decision to leave in the fog while the pilots of six other large commercial vessels decided not to depart in the heavy fog which was less than 0.5 nautical miles.
- Having made the decision to leave port in impenetrable fog, Captain Cota took no action to assure the fortification of the bridge or bow watch or review the passage plan with the master and crew of the *Cosco Busan*. In particular, Cota failed to have a master-pilot exchange to review the transit plan.
- Captain Cota has subsequently claimed that he found both radar unreliable, but he did not notify the master or the Coast Guard that a required piece of equipment needed to safely navigate the ship had failed. Meanwhile, the captured images of the radar retained on the ship's computer show that the radar was fully operational.
- The tape recorded conversations from the ship's bridge show that Captain Cota was confused regarding the operation of the electronic chart system upon which he chose to rely including the meaning of 2 red triangles that marked buoys marking the tower of the bridge that he eventually hit.
- At no time during the voyage after leaving the berth at 8:07 a.m. and prior to 8:30 a.m. did Captain Cota, or any of the ship's crew, consult the ship's official paper navigational chart or take a single positional fix. Captain Cota did not ask any crew member to take any fixes or verify the ship's position despite the lack of visibility. After the incident, Cota told the Coast Guard he did not request fixes because it is like "driving your car out of a driveway."

Prosecutors also filed papers showing that Captain Cota had failed to disclose his medical conditions and prescription drug use on required annual forms submitted to the Coast Guard.

The discharge of heavy fuel oil from the *Cosco Busan* fouled 26 miles of shoreline, killed more than 2,400 birds of about 50 species, temporarily closed a fishery on the bay, and delayed the start of the crab-fishing season. Monetary damages to the bridge, ship and private parties were in the tens of millions of dollars. Clean-up costs have been estimated to exceed \$70 million. The birds killed include Brown Pelicans, Marbled Murrelets and Western Grebes. The Brown Pelican is a federally endangered species and the Marbled Murrelet is a federally threatened species and an endangered species under California law.

Cota was licensed by the Coast Guard and California as a Bar Pilot, according to the indictment. He was a member of the San Francisco Bar Pilots and had been employed in the San Francisco Bay since 1981. In California, large ocean-going vessels are required to be piloted when entering or leaving port.

The grand jury indictment also charges Fleet Management Limited (Hong Kong), a ship management firm, with the same alleged offenses as well as false statements and obstruction of justice charges. Trial in that case is set for Sept. 14, 2009. An indictment is merely an accusation. All defendants are presumed innocent until proven guilty at trial beyond a reasonable doubt.

The investigation has been conducted by the Coast Guard Investigative Service, the EPA Criminal Investigation Division, the Federal Bureau of Investigation, the U.S. Fish and Wildlife Service and the California Department of Fish and Game, Office of Spill Prevention and Response.

The case is being prosecuted by Assistant U.S. Attorneys Stacey Geis and Jonathan Schmidt and Special Assistant U.S. Attorney Christopher Tribolet of the U.S. Attorney's Office for the Northern District of California, and Richard A. Udell, Senior Trial Attorney with the Environmental Crimes Section of the U.S. Department of Justice.

Under the Crime Victims' Rights Act, crime victims are afforded certain statutory rights including the opportunity to attend all public hearings and provide input to the prosecution. Those adversely impacted by the oil spill are encouraged to visit <http://www.usdoj.gov/usao/can/community/Notifications> to learn more about the case and the Crime Victims' Rights Act.

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Environment and Natural Resources Division

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Publications  
Case Highlights  
A-Z Index

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Internships

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Grants

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